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No. 97-2000

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

AMERICAN MANUFACTURERS MUTUAL INSURANCE COMPANY, *et al.*,

Petitioners,

vs.

DELORES SCOTT SULLIVAN, *et al.*,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

REPLY BRIEF FOR RESPONDENT SCHOOL DISTRICT OF PHILADELPHIA IN SUPPORT OF PETITIONERS

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488

The brief filed by Respondents in Opposition to Petitioners (hereinafter referred to as "Plaintiffs") demonstrates that all parties agree on one point — it is imperative that this Court address whether Pennsylvania's utilization review process comports with the due process requirements of the Fourteenth Amendment. Notwithstanding Plaintiffs' posture that due process issues are not before this Court, Plaintiff's brief at 2-4, 19; Plaintiffs concede that if this Court declines the opportunity to reach the second issue presented in Petitioners' Petition for Writ of Certiorari, the affect would "wreak havoc" on Pennsylvania's workers' compensation system. *Id.* at 2 n.4; *see also id.* at 17.

Plaintiffs' brief is misleading with respect to the status of the Commonwealth Defendants in this matter and the justiciability of the present case or controversy. There has been no "settlement" in this case between the Plaintiffs and the Commonwealth Defendants. Plaintiffs' allusions to the contrary are simply false. *See id.* at 2-3, 14-15 n.18.

1. Due Process Issues Are Squarely Before This Court For Review.

Plaintiffs' argument that no due process issues are before the Court is simply misplaced. This court granted, in whole, Petitioners' Petition of Writ of Certiorari and the second issue framed therein is:

> Whether the due process clause requires workers' compensation insurers to pay disputed medical bills prior to determination that the medical treatment was reasonable and necessary.

As this court is aware, the School District also filed a timely Petition for Certiorari in support of Petitioners' challenge to the Third Circuit's erroneous decision on due process grounds and presented a separate issue challenging the classification of the interest sought to be protected as not falling within the definition of "property interest" to which due process protection extends. Similarly, the Commonwealth filed a Conditional Cross-Petition for Certiorari in support of the petitions filed by Petitioners and the School District challenging the Third Circuit's decision on the state actor ruling as well as the due process holdings. Thus all defendants have challenged or otherwise sought to have reversed the Third Circuit's

misapplication of the Fourteenth Amendments due process requirements to Pennsylvania's utilization review system. The due process issue is compelling and squarely before this Court for review.

Plaintiffs assert that Petitioners have conceded that the Third Circuit properly ruled that the utilization review process was unconstitutional due to a lack of notice and opportunity to be heard, citing Petitioners' brief at p. 30. However, Petitioners never conceded that the procedures were unconstitutional due to lack of an opportunity to be heard as Plaintiffs contend. *Id.* at 4 n.7. Rather, Petitioners have consistently maintained that the procedures were constitutionally sound.

Moveover, the School District has consistently maintained that the procedures satisfy the mandates of due process because claimants are provided sufficient meaningful notice and a meaningful opportunity to be heard. Plaintiffs never addressed this argument in their brief. *Cf. id.* at 13 n.16.

As discussed more fully in the School District's brief, only a certain course of treatment is reviewed at any one time, the claimants are not deprived of their entitlement to ongoing reasonable and necessary medical benefits and the notice provided is sufficient to keep claimants advised of the pendency of the review and of an opportunity to be heard when practical. *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306 (1950) (notice need only apprise interested parties of the pendency of an action and afford them an opportunity to participate at a meaningful time). Since a process that would provide claimants with an opportunity to be heard before bills are submitted for review is impracticable, considering the requirement of the Pennsylvania Workers' Compensation Act that medical bills must be paid within thirty days, the utilization review process is constitutionally sound and does not violate the Fourteenth Amendment.[1]

1. Although Plaintiffs assert that no party disputes that the challenge statute permitted a recognized property right to be disrupted without pre-deprivation notice, the School District has maintained that claimants are not deprived of a property right without due process during the utilization review process. Claimants have simply chosen not to address the School District's arguments or analysis in their brief, presumably because they have no response to offer.

2. The Commonwealth Defendants Remain Parties In This Matter And The Issues Presented Herein Are Not Moot.

Even if a "settlement" was achieved with only the Commonwealth Defendants, neither the settlement with those defendants nor the choice of those defendants to change the conduct of which the plaintiff complains renders moot the present case or controversy between the Plaintiffs and Petitioners or the School District as Plaintiffs argue. *Id.* at 3 n.6. *See* L. Tribe, *American Constitutional Law* 89 (1988) (where a plaintiff seeks damages, a defendant's voluntary cessation of the conduct about which the plaintiff complains is irrelevant to the issue of mootness).

Petitioners and the School District presently face the possibility of enormous damages and, if the Third Circuit's decision is not reversed, will be left with a workers' compensation system that continues to encourage the exodus of business from Pennsylvania. This is certainly not a result that the legislature intended.[2]

The Commonwealth has not "altered" its procedures for utilization review to render the system constitutionally sound and the Third Circuit's *Sullivan* decision has not resolved the due process issues. *Id.* at 3. Although the Commonwealth changed its initial notification of utilization review form to try to mitigate the effect of the Third Circuit's *Sullivan* decision on Pennsylvania's system while this challenge is pending before this Court, the Commonwealth has not changed its utilization review procedures to provide employers relief from paying exorbitant unreasonable and unnecessary medical expenses with no opportunity to recoup these losses.

2. In their brief, Plaintiffs do not attempt to counter the legislative history of Act 44 or specifically address the intent of Pennsylvania's legislature in enacting Act 44. As methodically recounted in the brief of Petitioner and the School District, Act 44 was enacted for the express purpose of curtailing the exodus of jobs from the state as a direct result of the high cost of workers' compensation and the abuse of the system by medical providers. Rather, Plaintiffs summarily discount the legislative intent in enacting Act 44 as "political pressure" without identifying the reason or source of the pressure. *Id.* at 10.

CONCLUSION

For the foregoing reasons and those stated in the Brief of Respondent School District of Philadelphia in Support of Petitioners, the judgment of the United States Court of Appeals for the Third Circuit should be reversed and the judgments of United States District Court Judge Buckwalter reinstated.

Respectfully submitted,

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